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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 DAVID CARLETON, an individual,)
12)
13) Plaintiff,)
14)
15) v.)
16)
17) 504 GAP, INC. DISABILITY)
18) PLANS and THE GAP, INC., in its)
19) capacity as Plan Administrator,)
20)
21) Defendants.)

Case No. CV 07-5924 (JSW)

**DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

Motion Date: May 16, 2008

Motion Time: 9:00 a.m.

Courtroom: 2

ORAL ARGUMENT REQUESTED

22 **I. INTRODUCTION**

23 Defendants submit this reply brief in support of their motion to dismiss
24 plaintiff David Carleton's ("Carleton" or "Plaintiff") Second Cause of Action for
25 Breach of Fiduciary Duty and Third Cause of Action for Statutory Penalties.

26 Plaintiff's opposition fails to respond to Defendants' motion to dismiss and
27 its legal points and authorities. Instead, Plaintiff's opposition asserts a new
28 equitable remedy sought in the form of injunctive relief to prevent the Court's

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1 judgment from being “illusory and unenforceable”. Plaintiff attempts to use the
2 potential need for this equitable remedy to justify his breach of fiduciary duty
3 claim. Defendants find this both nonsensical and offensive to notions of federal
4 jurisprudence. Plaintiff’s implication that the Court may need injunctive relief to
5 uphold the Court’s own judgment -- should one be entered against Defendants -- is
6 bewildering. As the Court has adequate remedies at law for violation of a Court
7 order, Plaintiff’s new argument is nonsensical.

8 Plaintiff has a straightforward claim against Defendants for recovery of
9 benefits under the Plan. That is it. Plaintiff’s breach of fiduciary duty claim
10 asserts duplicative remedies as those sought under Plaintiff’s claim for benefits and
11 accordingly the claim should be dismissed. Plaintiff’s opposition does not dispute
12 that where relief sought under section 1132(a)(1)(B) and section 1132(a)(3) is
13 duplicative, the claim for breach of fiduciary duty will fail as a matter of law.

14 In addition to Plaintiff’s nonsensical argument regarding equitable remedies,
15 Plaintiff’s opposition cites a string of irrelevant cases in an attempt to support his
16 claim for statutory penalties. Plaintiff’s reliance on cases that discuss the
17 obligations of a claims administrator to produce documents requested after
18 termination of benefits does not address the vague and ambiguous nature of the
19 claim as pled. While clarity regarding the statutory basis for Plaintiff’s claim is a
20 start, and provides more information than that pled in the Complaint, Plaintiff
21 wholly fails to address Defendants’ argument that the claim is vague and
22 ambiguous with regards to the factual basis of the claim. As a result, Plaintiff has
23 failed to provide adequate notice regarding the basis of his statutory penalties
24 claim and accordingly, Defendants cannot properly respond to the allegations.
25 Plaintiff’s claim for statutory penalties fails as a matter of law.

26 Defendants’ motion to dismiss should be granted in total.

27 **II. FACTUAL SUMMARY**

28 Carleton incorrectly asserts that Defendants’ denial of benefits under the

1 plan was improper. Carleton has an adequate remedy for this alleged wrong in his
2 First Cause of Action for Recovery of Benefits Due Under the Defendant ERISA
3 Plan.

4 Carleton's Second Cause of Action for Breach of Fiduciary Duty seeks
5 identical relief to that sought under his claim for benefits. Plaintiff's opposition
6 concedes that Plaintiff can not obtain a double recovery by asserting identical
7 damages under multiple causes of action. (Plaintiff's Opposition 3:1-3). Under
8 both his first and second cause of action, Plaintiff claims verbatim that he "*has*
9 *suffered and will continue to suffer losses compensable under ERISA, including but*
10 *not limited to loss of his disability benefits, interest on those benefits, and*
11 *attorneys' fees, and expenses.*" (Complaint, ¶ 10 and ¶ 13). Plaintiff's opposition
12 completely ignores the plain language of his own Complaint and attempts to justify
13 the breach of fiduciary duty claim by asserting that a new equitable remedy –
14 injunctive relief, which allows the Court to enforce its own judgment – will be
15 sought at the time of trial. This assertion is specious and does not provide a basis
16 to withstand Defendant's motion to dismiss.

17 Carleton's Third Cause of Action for Statutory Penalties is premised on the
18 basis that at some point in time, someone made a request on behalf of Plaintiff to
19 some unknown person or entity, who in turn allegedly failed to produce some
20 unknown documents and/or information. This assertion epitomizes a vague and
21 ambiguous claim and fails to afford Defendants an opportunity to respond.
22 Defendant's motion to dismiss specified the factual information that would clarify
23 the basis for Plaintiff's claim, such that a responsive pleading could be generated.
24 Plaintiff completely ignores this aspect of Defendant's Motion and instead
25 responds by citing to irrelevant case law that sets forth the general guidelines for
26 Statutory Penalties under ERISA. The claim remains too vague and ambiguous as
27 pled to raise a right to relief above the speculative level.

28 ///

III. ARGUMENT AND AUTHORITY

At most, Carleton has an individual claim for recovery of his benefits under the plan. Defendants' Motion to Dismiss does not challenge this claim. Rather, Defendants' Motion properly seeks dismissal of Carleton's claims for breach of fiduciary duty and statutory penalties as pled.

A. CARLETON HAS AN ADEQUATE REMEDY UNDER ERISA FOR RECOVERY OF BENEFITS UNDER THE PLAN AND ACCORDINGLY THE DUPLICATIVE RELIEF SOUGHT UNDER HIS BREACH OF FIDUCIARY DUTY CLAIM FAIL AS A MATTER OF LAW

Plaintiff for the first time in his opposition clarifies that his claim for breach of fiduciary duty is brought under Section 1132(a)(3) of ERISA. Defendant will therefore focus on why Plaintiff's claim fails under this provision and will not re-address why the claim also fails under Section 1132(a)(2).

Plaintiff admits that where a claim under Section 1132(a)(3) seeks the same remedies as a claim under Section 1132(a)(1)(B), then the claim for equitable relief fails. (Plaintiff's opposition, 3:8-12.) However, Plaintiff attempts to distinguish this case from the above-referenced scenario by claiming that he seeks different remedies under his first and second causes of action. In support of his argument, Plaintiff asserts that at trial, he will seek equitable relief, which the Court may determine is necessary and appropriate to "prevent its judgment from being illusory and unenforceable". (Plaintiff's opposition, 3:3-5.) Not only is this remedy nowhere pled in the Complaint, but the premise of this statement is flawed and ignores the power of the federal courts to enforce their own judgments.

First and foremost, on the face of his Complaint, Plaintiff's Second Cause of Action "For Breach of Fiduciary Duty" seeks relief in the form of compensatory damages. Carleton asserts that he has "suffered and will continue to suffer losses compensable under ERISA, including but not limited to loss of disability benefits, interest on those benefits, and attorneys' fees and expenses." (Complaint, ¶ 13.) Defendant is unable to grasp the equitable nature of these damages as pled.

1 Plaintiff clearly asks for compensatory damages under his breach of fiduciary duty
2 claim, which are identical to the compensatory damages sought under Plaintiff's
3 First Cause of Action "For Benefits Due Under the Defendant ERISA Plan."
4 (Complaint, ¶ 10.) As Plaintiff himself points out, this claim is a straightforward
5 action to recover disability insurance benefits. (Plaintiff's opposition, 2:2.)

6 Further, Plaintiff's notion that the Court's judgment may be "illusory and
7 unenforceable" seems to bewilderingly suggest that the Court might not be able to
8 enforce its own judgment, should one be entered against Defendants. Plaintiff
9 goes on to say that "[i]n most ERISA cases, it is taken for granted that the plan
10 insurer will in fact honor its policy and pay the Court's judgment." (Plaintiff's
11 opposition, 3:27-28). Plaintiff again suggests that somehow the Court may be
12 unable to enforce its own judgment. Plaintiff himself states that a request for
13 equitable relief at the time of trial to enforce a judgment "may sound a bit
14 opaque". (Plaintiff's Opposition, 3:6). This is precisely Defendants' reaction. In
15 looking at Plaintiff's proposition on a larger scale, it seemingly suggests that in any
16 lawsuit where an award for damages is granted, that court would also need to grant
17 injunctive relief in order to ensure that the judgment for damages is upheld. Not
18 only would this clog the court system because a case could never be closed, but the
19 idea of a court needing additional protective measures to enforce its own judgment
20 is squarely at odds with the court system, where there is already an adequate and
21 available remedy at law when a party violates a court order.

22 Aside from Plaintiff's nonsensical argument regarding the Court's ability to
23 enforce its own judgments, Plaintiffs reliance on *Caplan v. CNA Short Term*
24 *Disability Plan*, 479 F.Supp.2d 1108 (N.D. Cal. 2007) is misplaced. The Court in
25 *Caplan* actually dismissed plaintiff's claim under section 1132(a)(3) to the extent
26 that it was duplicative of the plaintiff's section 1132(a)(1)(B) claim. *Id.* at 1112.
27 This is exactly what Defendants in the instant action ask of the Court. Plaintiff
28 attempts to use *Caplan* for the Court's holding that it would be "premature" to

1 dismiss a plaintiff's claim under 1132(a)(3) where the equitable relief sought under
 2 section 1132(a)(3) may be different than the relief available to the plaintiff under
 3 the section 1132(a)(1)(B) claim alone. *Id.* at 1113. However, in the instant case,
 4 on the plain face of his Complaint, Plaintiff asks for the identical relief under
 5 section 1132(a)(3) as he asks for under his section 1132(a)(1)(B) claim. Under
 6 both claims, Plaintiff repeatedly alleges that he "has suffered and will continue to
 7 suffer losses compensable under ERISA, including but not limited to loss of his
 8 disability benefits, interest on those benefits, and attorneys' fees, and expenses."
 9 (Complaint, ¶ 10 and ¶ 13). Under both claims, Plaintiff seeks to recover benefits
 10 under the plan. Plaintiff himself in his opposition reiterates that this is a
 11 "straightforward action to recover disability benefits". (Plaintiff's opposition, 2:2).
 12 This is exactly what led the Court to dismiss the plaintiff's breach of fiduciary
 13 duty claim in *Caplan*. *Caplan v. CNA Short Term Disability Plan*, 479 F.Supp.2d
 14 1108, 1113 (N.D. Cal. 2007).

15 In the instant action, we have a straight forward claim for benefits due under
 16 the plan. The Supreme Court, the Ninth Circuit and the Northern District of
 17 California have all held that a plaintiff may state a claim for equitable relief under
 18 section 1132(a)(3), but only where the plaintiff does not have an "adequate
 19 remedy" by way of his claim for benefits under section 1132(a)(1)(B). *See Varsity*
 20 *Corp. v. Howe*, 516 U.S. 489, 512 (1996); *Forsyth v. Humana, Inc.*, 114 F.3d,
 21 1467, 1474 (9th Cir.1997); *Caplan v. CNA Short Term Disability Plan*, 479
 22 F.Supp.2d 1108, 1112 (N.D. Cal. 2007).

23 Plaintiff additionally cites to the very applicable holding in *King v. CIGNA*
 24 *Corp.*, 2007 WL 2288117 (N.D. Cal.2007). In *King*, where the *only issue* was
 25 plaintiff's claim for disability benefits, the Court held that plaintiff's claim for
 26 breach of fiduciary duty under ERISA failed as a matter of law. *Id.* at *12.
 27 (emphasis added) Plaintiff's breach of fiduciary duty claim in *King*, is identical to
 28 the Plaintiff's claim in the instant action. In fact, one could surmise that Plaintiff

1 in the instant action took the language behind his breach of fiduciary duty claim
2 directly from the language in the *King* case. In the both cases, Plaintiff alleges
3 verbatim that “Defendants breached their fiduciary duties under ERISA by failing
4 properly to investigate and administer plaintiff’s claim for disability benefits, by
5 failing to provide a full and fair review of plaintiff’s appeal of the denial of [Plan]
6 benefits, and by failing to administer the Plan in accordance with the purposes of
7 the Plan and for the exclusive benefit of its beneficiaries.” (Complaint, ¶ 12.); *See*
8 *also King* at *12. The Court in *King* held that this exact claim failed as a matter of
9 law when accompanied by a claim for benefits. *Id.* at *12. Defendants
10 respectfully request that in line with the holding in *King*, this Court find that
11 Plaintiff’s claim for breach of fiduciary duty fails as a matter of law and therefore
12 must be dismissed.

13 Plaintiff attempts to distinguish the *King* case by stating that despite the
14 Court’s dismissal of the breach of fiduciary duty claim, the Court maintained the
15 jurisdiction requested by Plaintiff. (Plaintiff’s opposition, 4:12-13.) Defendant is
16 unable to grasp how this bolsters Plaintiff’s argument. The prevailing point to be
17 taken from the holding in *King* is that the Court dismissed plaintiff’s breach of
18 fiduciary duty claim as it failed as a matter of law. *King* at *13. The Court
19 simultaneously maintained jurisdiction to “amend the Judgment” if necessary. *See*
20 Judgment in *King v. CIGNA Corp.*, 2007 WL 2288117 at paragraphs 2 and 3 (N.D.
21 Cal.2007) (attached as an appendix to Plaintiff’s opposition). The Court in *King*
22 exercised the power entrusted to all courts as a matter of law, the power to enforce
23 their own judgments. Plaintiff does not need an equitable remedy to ensure that
24 the Court will enforce its own judgment in the instant action and to suggest
25 otherwise would be offensive to the Court. Just as the Court in *King* was able to
26 dismiss the breach of fiduciary duty claim and still maintain the power to enforce
27 its judgment regarding benefits due under the plan, Plaintiff can rest assured that
28 the Court’s powers have not changed since the holding in *King* came down.

Contrary to Plaintiff's attempts to differentiate the *King* case, Defendants point out that similarly in *King* the plaintiff alleged that if the Court ruled in her favor, she would seek equitable relief if the plan administrator refused to pay. *King v. CIGNA Corp.*, 2007 WL 2288117 at *12 (N.D. Cal.2007). In response, the Court in *King* ruled that because plaintiff's claim was a straightforward claim for disability benefits, any relief sought by plaintiff under her claim for equitable relief would not be different than the relief available under section 1132(a)(1)(B). *Id.* The Court accordingly dismissed plaintiff's claim for breach of fiduciary duty, holding that it failed a matter of law. *Id.* The Court's holding in *King* mirrors the situation in the instant action, where Plaintiff seeks identical remedies, as stated on the face of his Complaint, under both his claim for relief under section 1132(a)(1)(B) and his claim for relief under section 1132(a)(3). Any relief sought by Plaintiff under his claim for breach of fiduciary duty would be identical to relief available under 1132(a)(1)(B), as both seek benefits under the plan. Accordingly, Plaintiff's claim for breach of fiduciary duty must be dismissed because it fails as a matter of law.

B. PLAINTIFF'S CLAIM FOR STATUTORY DAMAGES FAILS TO RAISE A RIGHT TO RELIEF ABOVE THE SPECULATIVE LEVEL AND THEREFORE FAILS AS A MATTER OF LAW

Plaintiff apparently finds it incomprehensible that Plaintiff's claim for statutory penalties is too vague and ambiguous, even under pleading standards. However, for the first time in this case, Plaintiff uses his opposition to cite a string of ERISA provisions that he asserts support his claim. (Plaintiff's opposition, 4:12-13.) Although Plaintiff has now attempted to clarify the statutory grounds for his claim, he has failed wholly to provide any factual information that demonstrate the grounds for his claim, which would afford Defendant adequate notice to formulate a response. Defendant concedes that this case is subject to the liberal notice pleadings standards of Fed. R. Civ. P. 8. However, even under notice

1 pleading standards, in order to survive a motion to dismiss for failure to state a
2 claim, plaintiffs must allege “enough facts to state a claim to relief that is plausible
3 on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). The
4 Supreme Court has held that while a complaint need not plead “detailed factual
5 allegations,” the factual allegations it does include “must be enough to raise a right
6 to relief above the speculative level.” *Id.* at 1964-65.

7 Defendants do not seek “detailed factual allegations” in the instant action, as
8 Plaintiff would have the Court believe. Rather, in accordance with the holding in
9 *Bell Atlantic*, Defendants seeks factual information sufficient to “raise a right to
10 relief above the speculative level.” *Id.* Defendant’s motion to dismiss even
11 provides examples of the information that would put Defendant on adequate notice
12 of the claim, such that Defendant could to formulate a response. These facts
13 include what documents Plaintiff or his representative requested, what information
14 was requested, to whom the requests were made and when such requests were
15 made. (Defendant’s Motion to Dismiss, 10:28-11:1.) Yet, Plaintiff’s opposition
16 remains completely devoid of any of this information. Plaintiff does not even
17 address these facts and accordingly gives the impression that Plaintiff does not
18 possess any such information to support his claim. Defendant cannot be expected
19 to respond to such a claim while left in a dark vacuum.

20 Instead of providing additional information to support his own claim,
21 Plaintiff cites to an irrelevant case that involves a pension plan (not a health care
22 plan) and its holding that a prerequisite showing of bad faith and actual harm is not
23 necessary to find a plan administrator liable for penalties. *See Berry v. Wise*, 2004
24 U.S. Dist. LEXIS 10479, 9-14 (D. Or. 2004). This case has no relevance to
25 Defendant’s motion to dismiss. Defendant is not suggesting one way or another
26 whether bad faith or actual harm play a role in awarding statutory penalties.
27 Rather, Defendant seeks clarity on the statutory penalty claim as pled and the
28 grounds for bringing such a claim. Without any factual information to support his

1 claim for statutory penalties, Plaintiff makes it impossible for Defendant to
2 respond for multiple reasons. First and foremost, ERISA Section 1132(c) provides
3 what has been characterized as an affirmative defenses for a plan administrator,
4 which affords an opportunity to explain the failure or refusal to provide documents
5 and/or information that may be beyond the control of the administrator. *See Kerr*
6 *v. Charles F. Vatterott & Co.*, 184 F.3d 938, 947-48 (8th Cir.1999) (interprets the
7 phrase in section 1132(c) stating “unless such failure or refusal results from
8 matters reasonably beyond the control of the administrator” was in the nature of an
9 affirmative defense, which the administrator has the burden of establishing).
10 Without knowing the nature of the documents and/or information requested,
11 Defendant is unable to determine if any applicable affirmative defenses apply in
12 the instant action and accordingly Defendant is unable to respond to Plaintiff’s
13 claim.

14 Further, without knowing to whom Plaintiff’s alleged requests were made,
15 Defendant is unable to respond. As Plaintiff himself points out, ERISA cases are
16 unique and often times somewhat complicated. Different parties involved in a
17 beneficiary plan have different obligations regarding document production under
18 ERISA. As worded, Plaintiff’s claim does not afford Defendants a reasonable
19 opportunity to respond to the claim for statutory penalties because Defendant does
20 not have any information regarding to what individual/entity said requests were
21 addressed and accordingly what obligations were imposed under ERISA. 29
22 C.F.R. section 2560.503-1.

23 Plaintiff’s claim for statutory penalties is based on conclusory allegations,
24 and is unsupported by any factual averments. As a result, Plaintiff’s claim as pled
25 should be dismissed for failure to state a claim to which Defendant can respond.
26 *See Steelman v. Prudential Ins. Co. of America*, 2007 WL 2009805 (E.D.Cal.
27 2007) (where the complaint failed to sufficiently allege how defendant's actions
28 violated a plan term or ERISA, the court found that although plaintiffs created a

suspicion of a legally cognizable claim, the complaint needed to contain more in order to survive a motion to dismiss).

IV. CONCLUSION

Carleton's Second Cause of Action For Breach of Fiduciary Duty and Third Cause of Action for Statutory Penalties should be dismissed with prejudice because they both fail as a matter of law. Carleton's breach of fiduciary duty claim is inappropriate where identical remedies are available under his claim for benefits. Carleton's claim for statutory penalties fails to provide any factual basis for the claim and creates only the suspicion of a legally cognizable claim, which is not enough to survive a motion to dismiss.

Dated: April 25, 2008

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